



Office of the Attorney General  
State of Texas

April 12, 1993

DAN MORALES  
ATTORNEY GENERAL

Ms. Annette Jones  
Police Legal Advisor  
City of Waco  
P.O. Box 2570  
Waco, Texas 76702-2570

OR93-179

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19568.

The Waco Police Department (the "department") has received three open records requests for copies of a tape recording of the 911 calls that the department's dispatch office received from the Branch Davidian compound on February 28, 1993. You state that as of the date of your request for an open records decision to this office, the department's only recorded copy of the calls existed on reel-to-reel tapes and that due to the nature of the tapes it will take several weeks to make copies onto cassette tapes. You contend that because the department considers these tapes to be evidence gathered as part of criminal investigations conducted by the department, the Texas Rangers, and Federal Bureau of Investigation, once these recordings are made they will come under the protection of sections 3(a)(3), the "litigation exception," and 3(a)(8), the "law enforcement exception," of the Open Records Act.

In this instance, however, this office need not determine whether either of these exceptions to required public disclosure apply. The department has received a federal grand jury subpoena for the "[o]riginal and *all copies* of 911 tape for February 28, 1993" (emphasis added). Generally, information in the actual or constructive possession of a grand jury is not subject to the Open Records Act. See V.T.C.S. art. 6252-17a, § 2(1)(H) (judiciary not subject to the Open Records Act); Open Records Decision No. 433 (1986) (grand jury is an extension of the judiciary for purposes of the act).

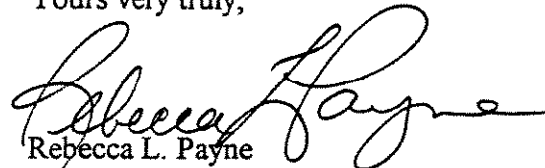
However, in Open Records Decision No. 513 (1988), this office held that information may not be withheld as information in the constructive possession of the grand jury merely because the information had been submitted to the grand jury pursuant to a subpoena: for a governmental body, as defined in section 2(1) of the act, to withhold such information, the governmental body must have either gathered or created the information

at the behest of the grand jury. Consequently, a record created or gathered pursuant to a governmental body's own authority that is subsequently subpoenaed by the grand jury is still subject to the open records act if the governmental body continues to hold a copy of that record after compliance with the subpoena; such a record may be withheld only if one of the act's exceptions applies. *Id.*

In this instance, however, the federal grand jury has subpoenaed all copies of the requested tape recordings. Because the department will possess no copy of the requested tapes after it has complied with the subpoena, the only existing copies of the tapes will be in either the actual or constructive possession of the grand jury and thus will not be subject to the Open Records Act. Accordingly, the department should not release this information. *See also* Rule 6(e) Fed. R. Crim. Proc. (secrecy of federal grand jury proceedings).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-179.

Yours very truly,

  
Rebecca L. Payne  
Assistant Attorney General  
Opinion Committee

RLP/lmm

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ID# 19612

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